

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2002-0409, State of New Hampshire v. David Fischer, the court on October 21, 2004, issued the following order:

The defendant, David Fischer, appeals a decision of the trial court denying his motion for new trial based on ineffective assistance of counsel. The facts of this case are set forth in State v. Fischer, 143 N.H. 311 (1999). We affirm.

To prevail on a claim of ineffective assistance of counsel, a defendant must first show that counsel's representation was constitutionally deficient and then that the deficient performance actually prejudiced the outcome of the case. See State v. Roy, 148 N.H. 662, 664 (2002) (standard for determining whether counsel's performance constitutionally deficient same under State and Federal Constitutions). "If the defendant is unable to demonstrate such prejudice, we need not even decide whether counsel's performance was deficient." State v. Sanchez, 140 N.H. 162, 163 (1995) (quotations and brackets omitted).

The defendant first contends that his counsel was ineffective by failing to object to the court's failure to adequately instruct the jury on substantial step. He contends that the court's omission of the language that it is up to the jury "to decide whether the act constitutes a substantial step" lowered the burden on the State to prove every element beyond a reasonable doubt. The court instructed the jury as follows: "To prove the defendant attempted to commit the crime of first degree assault, the State must prove beyond a reasonable doubt, one, that the defendant intended the crime of first degree assault be committed. . . . Second, that the defendant took a substantial step towards the commission of the crime. Any act by the defendant at the time alleged must be more than mere preparation to commit the crime. The act or acts must be a substantial step towards the commission of the crime. A substantial step means acts by the defendant which strongly support the conclusion that he intended to commit the crime of first degree assault. Here the State must prove beyond a reasonable doubt the following elements which comprise the offense of first degree assault. . . . And, four, that under the circumstances as the defendant believed them to be, such acts were a substantial step towards the commission of the crime of first degree assault." The court also stated: "You must consider [the defendant] to be innocent until the State convinces you beyond a reasonable doubt that he is guilty of each element of the two charges alleged. If, after all the evidence, you have a reasonable doubt as to the defendant's having committed one or more elements of the offense, then you must find the defendant not guilty

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of that offense.” Having reviewed the instructions in their entirety, we conclude that the court adequately apprised the jury of its duty to find that the State proved each element beyond a reasonable doubt. See State v. Lamprey, 149 N.H. 364, 366 (2003) (allegations of error will be evaluated by interpreting the jury instructions in their entirety). We therefore agree with the trial court that the defendant failed to prove that counsel’s performance was ineffective.

The defendant next raises his counsel’s failure to request that the trial court define “serious bodily injury” in its jury instructions. “Serious bodily injury” is defined in RSA 625:11, VI (1996) as “any harm to the body which causes severe, permanent or protracted loss of or impairment to the health or of the function of any part of the body.” The victim testified that the defendant entered her car, put his hands on her neck and, while choking her, said he was going to kill her. Even if we assume that it was error not to have included the definition of “serious bodily injury” in the instructions, we agree with the trial court that under these facts the threatened result was serious bodily injury by any definition. Accordingly, we conclude that the defendant failed to prove that there was a reasonable probability that, but for counsel’s alleged unprofessional errors, the result would have been different, see State v. Chase, 135 N.H. 209, 212 (1991), and thus failed to prove prejudice.

We find the defendant’s argument concerning the lack of a lesser included instruction similarly unpersuasive. See State v. Roy, 148 N.H. 662, 664 (2002) (broad discretion permitted trial counsel in determining trial strategy and defendant must overcome presumption that counsel’s trial strategy was reasonably adopted); *id.* at 665 (in resolving whether counsel’s strategy reasonably adopted, we will not disturb factual findings of trial court unless unsupported by the evidence or erroneous as matter of law). In this case, the defendant’s trial testimony supports defense counsel’s decision to forego a lesser included offense instruction.

The defendant also contests the sufficiency of the evidence and his counsel’s failure to move for dismissal. Even if properly before us, this argument has no merit. See State v. King, 151 N.H. 59, 61 (2004) (in appeal challenging sufficiency of evidence, defendant bears burden of proving no rational trier of fact viewing evidence in light most favorable to State could have found guilt beyond reasonable doubt). The victim’s testimony concerning the defendant’s statements as he was choking her was sufficient to convict him of attempted first degree assault; her testimony that he yelled at her that if she called the police,

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he would kill her, provided a basis for his witness tampering conviction, see RSA 641:5, I (1996).

The defendant also argues that his counsel's preparation was inadequate. The record reflects that it was the defendant's decision to proceed to trial even though he learned just prior to it of two witnesses not on the State's list and that the victim's testimony would be hostile. He also agreed that the victim should not be cross-examined on inconsistencies because evidence of his prior assault of her could be admitted. Neither a review of the testimony of these witnesses, nor the defendant's arguments in his briefs, persuade us that but for counsel's alleged unprofessional errors, the result of the trial would have been different. See Chase, 135 N.H. at 212. Thus, the defendant has not proven prejudice.

To the extent that the defendant raises other issues, he has either failed to provide an adequate record for our review or to address them with more than a passing reference, see State v. Blackmer, 149 N.H. 47, 48-49 (2003), or they have no merit, see State v. Belton, 150 N.H. 741, 750 (2004). We therefore give them no further consideration.

Affirmed.

NADEAU, DALIANIS and GALWAY, JJ., concurred.

**Eileen Fox,
Clerk**

Distribution:

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